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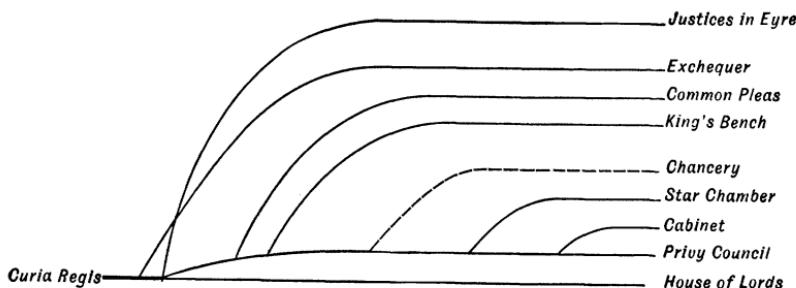
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THE DESCENDANTS OF THE CURIA REGIS

THE publication by Mr. L. O. Pike of a chart of the descent of English institutions,¹ leads me to print a somewhat similar chart which I have used for a number of years past in my instruction in English constitutional history in Yale College. It may prove useful to other teachers.

It will be seen at once on comparison that Mr. Pike's chart is more complete than mine, that it contains more detail, and gives more attention to chronology.² My own was kept intentionally free from detail, and made to include only the larger features of the constitution in order to bring out as clearly as possible, for class room purposes, the relation of the principal modern institutions back to the *curia regis*, and the generic position which the *curia* occupies in constitutional history. From its very simplicity, I venture to think that this chart brings out graphically these points and relationships, which it is of great importance to keep in mind, more clearly than does Mr. Pike's. This is its only special value.



To understand English constitutional history, particularly the more puzzling features of it, there are two things which must be seen clearly at the beginning and never lost from sight. The first of these is the position of the *curia regis* in the feudal state—the fact that the feudal government was simple and undifferentiated and

¹ *The Public Records and the Constitution. A Lecture* (London, 1907), by Luke Owen Pike.

² Reference should also be made to a chart of the descent of French institutions, which has special reference to the various royal councils, published by M. Noël Valois in *Le Conseil du Roi aux XIV^e, XV^e, et XVI^e Siècles* (Paris, 1888). If I am correctly informed a chart, somewhat like Mr. Pike's, has been used in instruction in Oxford for some time. It has not been published, I believe, but it would be to the general advantage if it were.

that the general organ of that government, the organ for everything not merely local, was the *curia regis*. All those functions which we are accustomed to assign in the modern state to different institutions, or sets of officials, were exercised in the feudal state by the *curia* without consciousness of difference or any attempt at distinction. I am accustomed in my instruction to emphasize three general functions as especially defining the business of the *curia*—legislative, judicial, and conciliar.³ The point which it is of the greatest importance to understand clearly at the start is that these three functions, which we should call distinct, were exercised without distinction by the one institution, the *curia regis*. As I have said elsewhere: “In a single session of the court, advice might be given to the king on some question of foreign policy, and on the making or revising of a law; and a suit between two of the king’s vassals might be heard and decided: and no one would feel that work of different and somewhat inconsistent types had been done. One seemed as properly the function of the assembly as the other.”⁴

The second fact which must never be forgotten is the existence of the *curia regis* in two forms. The fact is so peculiar according to modern ideas that it is difficult to describe it in language which is at the same time accurate and sufficient to convey an understanding of the case. The *curia regis* was constantly in session under one or the other of two forms, never at the beginning apparently under both at once. One is the great *curia regis*, called after a time *magnum concilium*, meeting occasionally only, on special summons, and composed of all tenants in chief, lay and ecclesiastical, who might be summoned, and the great officers of state and of the household, who undoubtedly in early times would all be included also among the tenants in chief. The other is the small *curia*, practically in constant session when the other was not, called, when men began to distinguish it somewhat clearly from the other, the perpetual, or ordinary council, and composed of the royal officers, and of tenants in chief who were in attendance on the king, or might happen to be at court. The point of importance and of difficulty is not the composition or the meeting of the smaller *curia*, but the fact that it was in rights, powers, and functions, the larger. It was not a committee of the larger, its powers were not vested in it by the larger, it was not responsible to the larger; it was the larger. What-

³ For completeness, the function of the *curia* in reference to the administrative system should also be included, and Mr. Pike’s chart brings out as mine does not the relation of these institutions in later times to the others which were derived from the common source.

⁴ *The Political History of England*, vol. II. (1905), p. 182. See the fuller account of these institutions there given.

ever the larger might do the smaller might do, and the three functions which I have named as belonging to the *curia regis* in the feudal state were exercised by it under both forms alike.

These then are the two essential things to have clearly in mind in beginning to study the constitutional history of England: that all the functions of the state were exercised by a single institution, and that that institution existed under two forms which were distinguished from each other only by size and manner of meeting. Now the process by which the modern constitution has been formed from this simple feudal state was that of differentiation—first the setting off of a particular sort of business into a class by itself, for mere convenience sake, then the assignment of certain men belonging to the *curia* to have the special duty of looking after that class of business. So gradually a cleavage took place which after a time gave rise to a separate institution. In this way one institution after another was thrown off from the original *curia*, the differentiation following always the general lines of function. It should be noticed also that it was from the small *curia* in all cases that the splitting off occurred. This is natural, for the fact that it was in constant session put into its hands particularly the carrying on of government.

What the first differentiation was, I believe no one can say with certainty, but I am inclined to think that it was a tendency to set off by itself the financial business which we know as exchequer business. However this may be, the differentiation which is fundamental and which has the largest influence on later history is that of the smaller from the larger *curia regis*. As the formation of two distinct institutions, generally recognized as such, this took place only during the thirteenth century, but we may fairly say that it began when men began to notice that the *curia* existed under two forms. We probably can detect this fact in written evidence no earlier than the reign of Henry I.⁵ I have endeavored to represent on the chart the two as going on side by side and united till about that time, and then beginning to separate and, from a later point, from some time in the thirteenth century, rather before the separation of the chancery system, as running down to the present along two parallel lines.

At this point must be emphasized the fact that both divisions alike carried on permanently the three functions of the original

⁵ To me it seems impossible to suppose that the *curia* did not exist in these two forms in the earlier reigns, and probably back to the very beginnings of this form of political organization. Whether this can be proved or not, is another matter.

curia. Circumstances tended in each line to emphasize one of these functions, to subordinate another, and to dwarf almost out of existence a third, but all three belonged equally to each institution after the separation. The union of new, representative elements with the *magnum concilium* to form Parliament, threw the emphasis in that line upon the legislative, but the House of Lords continued to exercise the judicial function, though it did not share it with the House of Commons, which could inherit nothing from the *curia regis*.⁶ The separate conciliar function practically disappeared, though not as the right of the individual peer, nor would its exercise by the House of Lords at any time in the past have seemed a straining of the constitution. Along the other line it was the conciliar function which was naturally emphasized, the judicial remained, but in a subordinate place, and the legislative became insignificant, the modern orders in council bearing scarcely a trace of the source from which they came. It is only by having this fact clearly in mind that we can understand the reason for such seeming anomalies in the English constitution as the process of impeachment, and the existence of two supreme courts of appeal, the one, the House of Lords, primarily a legislative body, the other, the judicial committee, a part of the king's council.

A third differentiation began, as I think probable, at about the same time as the two already mentioned, though it was not put into permanent form until later,⁷ that of the justices in eyre, intended at the start merely to exercise in local districts, instead of at the king's court, for convenience and greater efficiency, both administrative and judicial functions of the *curia*.⁸ The itinerant justices' court was a session of the *curia* held locally. By degrees the administrative functions, which these itinerant courts had exercised in the counties, came to be better performed by other institutions which had in the meantime been developing, and they gave themselves up more and more exclusively to their judicial work, but unimportant relics of the old administrative functions of the *curia regis* may still be found in the operation of these courts in England, and of their American representatives, our circuit courts. I have made the line which represents the development of the exchequer court to cross the line of these courts, and brought it into close relation with those

⁶ That the judicial power of the House of Lords was exposed to some danger in the thirteenth century from the development of royal justice, and in the fourteenth from some confusion of mind on the part of Parliament, are no doubt facts, but neither affected the final result in the least.

⁷ See my article in this REVIEW, VIII. 487.

⁸ Mr. Pike's chart distinguishes the justices of assize from the justices in eyre, and this should of course be done in any detailed study.

of the other common law courts, because in my use of this chart I have emphasized the judicial development and paid little attention to the administrative. Of the three common law courts, I think I have placed about correctly the time and chronological order of their evolution, but it is impossible to indicate on a chart the fact that they were brought into existence by the continuous operation of the same principle.

The separation of the chancery system from the council I have shown by a broken line because, while the jurisdiction of the chancellor was a jurisdiction belonging to the council, developed by it, and derived by the chancellor from it, the chancellor never exercised that jurisdiction himself in or through the council, but only outside it, as more or less of a usurpation, an absorption at least of a function not originally pertaining to him. The function, however, just as truly belonged to the *curia regis* as did that which fell to the common law courts. The Court of Star Chamber is always a difficulty to the beginner in constitutional study. The origin and right of its functions, its institutional standing-ground, and the ease with which such a seemingly anomalous piece of machinery was set up and operated, with no sense of anything revolutionary or unusual, are found puzzling. It is most easily understood, as is the historical ground of a separate chancery system, when it is carried back to the original *curia* and its relationship to that institution is made clear.

The last differentiation which I notice is that of the cabinet, but this is of so peculiar a character as to give rise to a problem for the maker of a chart. Historically it is clearly an offshoot of the council and should be so represented. But it has now absorbed the whole conciliar function of the old *curia*, and left the Privy Council existing, so far as real business goes, only in committees. Should it not be the ending of the main line instead of an offshoot? Again the cabinet has brought together in its hands functions which make it, startlingly for modern times, a reproduction of the old smaller *curia*. Control of the administrative system belongs to it. Its relation to Parliament almost makes it a legislative body. It has been called a third house. Only the judicial function is lacking. A comparison of this sort brings out clearly the position of the cabinet in the modern constitution, but it is quite as easy to show historically that it derives from its line of descent only one of these functions, the conciliar, and that its administrative and legislative responsibilities have come to it from other sources.